

Irakli Managadze*

Unpacking U.S. and German Individual Bankruptcy Systems: Insights and Recommendations for Georgia

The article addresses the absence of individual bankruptcy law in Georgia, despite the growing need arising from increased credit accessibility and subsequent default rates. The central research question revolves around an in-depth examination of individual bankruptcy frameworks in the United States (U.S.) and Germany. Drawing from these jurisdictions, this article offers recommendations to inform Georgian lawmakers on key policies, regulations, and features to consider when instituting provisions for individual bankruptcy.

Furthermore, insights gained from an interview with Emeritus Professor Reinhard Bork, a distinguished authority on German insolvency law, enrich the discourse on the practical issues of the German consumer insolvency system.

Keywords: *Bankruptcy Stigma, Consumer Insolvency, Discharge, “Fresh-start”, Individual Bankruptcy, Liquidation, Second Chance.*

1. Introduction

Georgia has not implemented an individual bankruptcy system in the legislation. Individuals with financial distress cannot get discharged from their debts and therefore cannot receive a “fresh-start” either. They are registered in the Debtor Registry (Movaleta Reestri)¹ once they become the target of enforcement proceedings.² Individuals registered there cannot dispose of their property freely or even open a bank account.³ So, indebted individuals do not have a second chance and often there is no single way out of their financial distress. Despite the fact, that every asset they own could be sold in the enforcement proceedings, there may still be debts left.

158,422 natural persons were registered in the Debtor Registry in Georgia by 2019.⁴ It is even more dramatic that one-fifth of the workforce in Georgia is either registered in the debtors’ registry or on the list of bad debts in the banking sector.⁵ This shows that there is a critical problem that needs to

* LL.M. in Global Business Law and Regulation, Central European University (CEU). The author expresses gratitude to Professor Tibor Tajti (Central European University) for his invaluable guidance and support during the research. Also, the author extends his appreciation to Emeritus Professor Reinhard Bork (Hamburg University) for his insights into the German consumer insolvency system.

¹ Debtors’ Registry web-page, <<https://debt.reestri.gov.ge/>> [15.06.2023] (in Georgian).

² National Bureau of Enforcement <http://nbe.gov.ge/index.php?sec_id=367&lang_id=ENG> [15.04.2023].

³ Ibid.

⁴ <http://www.barristers.ge/ge/page/news_item/1388?fbclid=IwAR2moLIT0Y35U7VXBJ6IjX_1X-Lw-GEjEWtY99HYbdSIFWbuJ95TK4GzGU> [15.06.2023] (in Georgian).

⁵ Gvelebiani J., Kochlashvili A., Amisulashvili N., Feasibility Study: On the Regulation of Personal Insolvency, Tbilisi, 2021, 71.

be regulated by the legislation and an optimal way should be found to return those indebted individuals to the active economy.

On the other hand, in the U.S.⁶ and Germany,⁷ there are individual bankruptcy laws and individuals with financial distress can get their debts discharged if they satisfy certain preconditions imposed by the legislation. These individuals receive a “fresh-start” and therefore get a second chance.

The article covers U.S., German and Georgian jurisdictions. Because the U.S. bankruptcy code is considered a model that works well in practice and from which other countries can take lessons.⁸ On the other hand, Germany is one of the most impactful jurisdictions in civil law countries.⁹ We will overview how individual bankruptcy is regulated under the abovementioned legislations and try to give recommendations to Georgian legislators about how individual bankruptcy provisions can be implemented in Georgian reality.

2. Philosophy of Individual Bankruptcy

2.1. Discharge and the “Fresh-Start”

Discharge¹⁰ and its justification are widely discussed in the U.S. scholarly works, so we will overview the scope and justification of discharge mostly based on the U.S. perspective, but the theoretical analyses can be applied to any jurisdiction.

Discharge can be considered as the most important feature of Bankruptcy from the debtor’s perspective.¹¹ Discharge of debts can be seen as a trade-off, a debtor in financial struggles is relieved from the **pre-petition debts** but at the price of giving away his assets.¹² However, we should keep in mind, that certain debts cannot be discharged in bankruptcy.¹³

After discharge, the debtor is not obliged to pay the discharged debts and creditors are unable to bring any actions to collect them.¹⁴ Some view discharge “**as a form of limited liability for individuals**”.¹⁵

⁶ U.S. Code: Title 11, § 109 (b).

⁷ German Insolvency Code, Section 304.

⁸ *Tajti T.*, Bankruptcy Stigma and the Second Chance Policy: The Impact of Bankruptcy Stigma on Business Restructurings in China, Europe and the United States, *China-EU Law Journal*, Vol. 6, Issue 1-2, 2018, 26.

⁹ *See generally Kischel U.*, *Comparative Law*, Oxford, 2019, 359-60.

¹⁰ “A bankruptcy discharge releases the debtor from personal liability for certain specified types of debts. In other words, the debtor is no longer legally required to pay any debts that are discharged.”, United States Courts, <<https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/discharge-bankruptcy-bankruptcy-basics>> [20.10.2023].

¹¹ *Czarnetzky J. M.*, The Individual and Failure: A Theory of the Bankruptcy Discharge, *Arizona State Law Journal*, Vol. 32, №2, 2000, 394.

¹² *Sousa M.D.*, The Principle of Consumer Utility: A Contemporary Theory of the Bankruptcy Discharge, *University of Kansas Law Review*, Vol. 58, №10, 2010, 562-63.

¹³ *Clarkson K. W. and others*, *Business Law: Text and Cases*, 11th ed, Mason (U.S.), 2009, 621.

¹⁴ *Ibid.*

¹⁵ *Czarnetzky J. M.*, The Individual and Failure: A Theory of the Bankruptcy Discharge, *Arizona State Law Journal*, Vol. 32, №2, 2000, 396.

Discharge gives the debtor a **financial fresh start**.¹⁶ U.S. Supreme Court has stated that one of the main goals of the Bankruptcy Act is to “relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes”.¹⁷

Fresh-start is provided to “**honest but unfortunate debtors**”.¹⁸ It gives debtors new opportunities in life, they can start from “a new page” without the burdens of past financial obligations.¹⁹ So, discharge in individual bankruptcy, which results in a “fresh-start” for the “honest but unfortunate” debtor, is a central policy of the U.S. individual bankruptcy system.²⁰

2.2. The Justification of Discharge

Let’s try to see the justifications behind individual bankruptcy discharge and briefly discuss the theories justifying the need for individual bankruptcy. First of all, we should keep in mind that bankruptcy law is not just purely economic, but it is also a **social legislation**.²¹

The debtor cooperation theory explains that discharge was introduced because debtors knowing they can receive a discharge cooperate voluntarily, which is key to operating the bankruptcy system effectively.²² So, discharge gives individuals incentives to participate in the bankruptcy process.

On the other hand, **the humanitarian theory of consumer discharge** is based on forgiveness, the demonstration of mercy towards individuals and the natural law theory of morality.²³ In this respect, we should agree that society has the duty to promote the values of human dignity and self-respect.²⁴ Moreover, the Bankruptcy process gives an indebted individual the chance to become a productive member of society again.²⁵ Therefore, the “fresh-start” can preserve social order and peace in the community.²⁶

In line with the humanitarian theory of consumer discharge, we should also highlight the importance of individual bankruptcy during such unforeseen and uncontrollable circumstances as was outbreak of the Covid-19 pandemic.²⁷ It left a lot of debtors unemployed and unable to pay their

¹⁶ *Jackson T.H.*, *The Logic and Limits of Bankruptcy Law*, Washington D.C., 2001, 225.

¹⁷ *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934).

¹⁸ *Baird D. G.*, *The Elements of Bankruptcy*, 5th ed., New-York, 2010, 30.

¹⁹ *Byington J. S.*, *The Fresh Start Canon*, *Florida Law Review*, Vol. 69, №1, 2017, 116.

²⁰ *See generally Tabb C. J.*, *Law of Bankruptcy*, 5th ed., St. Paul, 2020, 949-52.

²¹ *Zywicki T. J.*, *Bankruptcy Law as Social Legislation*, *Texas Review of Law & Politics*, Vol. 5, №2, 2001, 394.

²² *Sousa M.D.*, *The Principle of Consumer Utility: A Contemporary Theory of the Bankruptcy Discharge*, *University of Kansas Law Review*, Vol. 58, №10, 2010, 585.

²³ *Ibid*, 587-88.

²⁴ *Byington J. S.*, *The Fresh Start Canon*, *Florida Law Review*, Vol. 69, №1, 2017, 120-21.

²⁵ *Sousa M.D.*, *The Principle of Consumer Utility: A Contemporary Theory of the Bankruptcy Discharge*, *University of Kansas Law Review*, Vol. 58, №10, 2010, 588.

²⁶ *Byington J. S.*, *The Fresh Start Canon*, *Florida Law Review*, Vol. 69, №1, 2017, 120.

²⁷ *See generally* <<https://www.justia.com/covid-19/debts-and-bankruptcy-during-the-covid-19-outbreak/>> [15.06.2023].

creditors without any fault on their side.²⁸ We can presume, that such events also justify the existence of a discharge policy.

Furthermore, Thomas H. Jackson tried to justify bankruptcy discharge based on **the impulsive control of individuals**.²⁹ He thinks, that impulsive persons choose to consume today, rather than plan for the future.³⁰ Because of this impulsiveness individuals can experience regret over time and that is why legislators introduced nonwaivable³¹ discharge.³² Nonwaivable discharge protects impulsive debtors because it forces the creditors to monitor and control borrowing more thoroughly.³³

Professor Jackson also thinks, that decision-makers often **overestimate chances of success** and underestimate risks.³⁴ Some completely disagree with Jackson and think that the differentiation of creditors as rational and debtors as irrational (not being able to control themselves or plan for the future) is not reasonable.³⁵

Moreover, the “**entrepreneur hypothesis**” claims that bankruptcy discharge can be seen as a part of the institutional framework, which is necessary for **encouraging entrepreneurship in the market**.³⁶ The author of this hypothesis thinks that bankruptcy discharge fosters entrepreneurship and that is why legislation guarantees it.³⁷

Additionally, Professor Jackson suggests that if the indebted individual is not discharged of his debts, he may have no stimulation to work more in the future and may devote more time to leisure, therefore making less contribution to society (do not pay taxes, depend on social welfare programs, etc....).³⁸ Others also think that the main justification for the discharge is “to restore the debtor to participate in the open credit economy”.³⁹ So, the “fresh-start” helps individual debtors to stay economically productive and contribute to society.⁴⁰

Based on the above-discussed justifications we can say, that bankruptcy discharge is a really important legal mechanism. At least some arguments should convince the majority why it is necessary to have individual discharge as part of the bankruptcy legislation.

²⁸ See generally Wang J. and others, Bankruptcy and the COVID-19 Crisis, Harvard Business School, Working Paper 21-042, September 2020, 1-5.

²⁹ Jackson T.H., The Logic and Limits of Bankruptcy Law, Washington D.C., 2001, 234-36.

³⁰ Ibid, 235.

³¹ Meaning individuals cannot waive their right of discharge by any contract.

³² Ibid, 233.

³³ Ibid, 236.

³⁴ Ibid, 239.

³⁵ Carlson D. G., Philosophy in Bankruptcy, Michigan Law Review, Vol. 85, Issue 5 & 6, 1987, 1365.

³⁶ Czarnetzky J. M., The Individual and Failure: A Theory of the Bankruptcy Discharge, Arizona State Law Journal, Vol. 32, №2, 2000, 399.

³⁷ Ibid, 464.

³⁸ Jackson T.H., The Logic and Limits of Bankruptcy Law, Washington D.C, 2001, 245.

³⁹ Sousa M.D., The Principle of Consumer Utility: A Contemporary Theory of the Bankruptcy Discharge, University of Kansas Law Review, Vol. 58, №10, 2010, 589.

⁴⁰ Byington J. S., The Fresh Start Canon, Florida Law Review, Vol. 69, №1, 2017, 121.

2.3. Bankruptcy Stigma

Christianity, Islam, Judaism and Hinduism all highlight the importance of debt repayment and therefore promote the avoidance of bankruptcy.⁴¹ In the past going bankrupt was almost the same as committing a crime.⁴² In ancient Rome (according to the Twelve Tables) the creditor had the right to imprison the debtor who could not pay and treat him like a slave, even sell him to other country or cut a proportionate share of his body.⁴³

In England, according to early bankruptcy laws, if the debtors did not participate in the bankruptcy process, they could get the death penalty.⁴⁴ Based on this short historical overview, it should be no surprise why filing for individual bankruptcy can have stigmatizing effects. A **social stigma** still attaches to debtors who do not pay their creditors even in the U.S. which is considered the most tolerant bankruptcy system.⁴⁵

Bankruptcy stigma can be explained as an injury to reputation that a person can get as a result of filing for bankruptcy, some can even decide not to file because being afraid of this reputational loss.⁴⁶ Generally, it is accepted, that bankruptcy stigma is lower in *common law* jurisdictions than in *civil law* jurisdictions.⁴⁷ The U.S. should be considered a country with **the lowest intensity of stigma**.⁴⁸ The right to bankruptcy and a fresh start in the U.S. is sometimes even considered the right of the same importance as constitutional rights.⁴⁹ This is the reason why the U.S. bankruptcy system predominantly works properly in practice and it is considered as a model bankruptcy law by many.⁵⁰

On the other hand, Germany is often used as a contrast to the U.S., with a **very high level of stigma**.⁵¹ But according to Professor Reinhard Bork in Germany the intensity of bankruptcy stigma today is quite low when it comes to consumer insolvency and he justifies it by the huge number of individuals filing for consumer insolvency every year.⁵²

⁴¹ Zywicki T. J., Bankruptcy Law as Social Legislation, Texas Review of Law & Politics, Vol. 5, №2, 2001, 398.

⁴² Tajti T., Bankruptcy Stigma and the Second Chance Policy: The Impact of Bankruptcy Stigma on Business Restructurings in China, Europe and the United States, China-EU Law Journal, Vol. 6, Issue 1-2, 2018, 12.

⁴³ Tabb C. J., Brubaker R., Bankruptcy Law: Principles, Policies, Practice, 1st ed., U.S., 2003, 57.

⁴⁴ Ibid, 57-58.

⁴⁵ Adler B.E., Baird D.G., Jackson T. H., Bankruptcy: Cases, Problems and Materials, 4th ed., New York, 2007, 560.

⁴⁶ Sullivan T. A., Warren E. & Westbrook J. L., Less Stigma or More Financial Distress: An Empirical Analysis of the Extraordinary Increase in Bankruptcy Filings, Stanford Law Review, Vol. 59, Issue 2, 2006, 233.

⁴⁷ Tajti T., Bankruptcy Stigma and the Second Chance Policy: The Impact of Bankruptcy Stigma on Business Restructurings in China, Europe and the United States, China-EU Law Journal, Vol. 6, Issue 1-2, 2018, 26.

⁴⁸ Ibid, 15.

⁴⁹ Ibid, 16; see cit.: Ferguson N., The Ascent of Money: A Financial History of the World, New York, 2009, 60.

⁵⁰ Ibid.

⁵¹ Tajti T., Bankruptcy Stigma and the Second Chance Policy: The Impact of Bankruptcy Stigma on Business Restructurings in China, Europe and the United States, China-EU Law Journal, Vol. 6, Issue 1-2, 2018, 15.

⁵² Interview with Reinhard Bork, Emeritus Professor, Faculty of Law, Hamburg University (Hamburg, Germany, 21 March 2023).

Overall, it is quite hard to measure bankruptcy stigma with some kind of scale or index, as it is hardly quantifiable.⁵³ Legislators should keep in mind bankruptcy stigma when enacting bankruptcy laws. Also, we should keep in mind, that there is nothing wrong with “**a healthy bit of stigma**”, which will make individuals not file for bankruptcy without a legitimate reason, as an easy way out of their obligations.⁵⁴

2.4. Terminology Caveat

There are differences in different systems when it comes to legal terminology. In the U.S. bankruptcy proceedings refer to all kinds of insolvency-related proceedings.⁵⁵ In the German Insolvency Code, chapter 10 is named ‘consumer insolvency proceedings’. In scholarly materials sometimes the terminology seems to be used interchangeably.⁵⁶ For the aims of this article, the term individual bankruptcy will be used to refer to U.S. and consumer insolvency to the German system. For Georgia U.S. nomenclature and the term “individual bankruptcy” will be used.

3. Individual Bankruptcy in the United States

3.1. Short Overview of the United States Bankruptcy System

The constitution of the U.S. gives the Congress right to enact **uniform federal laws** regarding bankruptcy.⁵⁷ **The Bankruptcy Act of 1898**, which is the first permanent federal bankruptcy legislation, is considered the foundation of modern bankruptcy law as we know it.⁵⁸ The 1898 Act was quite liberal compared to the earlier laws.⁵⁹ It strictly limited the number of grounds for denying discharge.⁶⁰ Overall, it was still viewed as a more **trader-friendly** act.⁶¹

In the 1920s and 1930s, the U.S. bankruptcy system was converted and became more **consumer-friendly** and “fresh-start” for individuals became a leading principle.⁶² Following, **the Bankruptcy Reform Act of 1978** was the first complex reform of the federal bankruptcy law in decades, it replaced the 1898 Act.⁶³ The 1978 Act created the **Bankruptcy Code** that is in effect in the

⁵³ Tajti T., Bankruptcy Stigma and the Second Chance Policy: The Impact of Bankruptcy Stigma on Business Restructurings in China, Europe and the United States, *China-EU Law Journal*, Vol. 6, Issue 1-2, 2018, 26.

⁵⁴ *Ibid*; see cit.: World Bank (2013) Insolvency and Creditor/Debtor Regimes Task Force, Report on the Treatment of the Insolvency of Natural Persons, para 118, page 42.

⁵⁵ *Ibid*, 8.

⁵⁶ See *Fossen F.M.*, Personal Bankruptcy Law, Wealth, and Entrepreneurship—Evidence from the Introduction of a “Fresh Start” Policy, *American Law and Economics Review*, Vol. 16, №1, 2014, 273 – the article refers to German personal bankruptcy law.

⁵⁷ Constitution of the United States, Article I, Section 8.

⁵⁸ *Tabb C. J.*, *Law of Bankruptcy*, 5th ed., St. Paul, 2020, 39.

⁵⁹ *Ibid*.

⁶⁰ *Ibid*.

⁶¹ *Ramsay I.*, *Personal Insolvency in the 21st Century*, Oxford and Portland, 2017, 37.

⁶² *Ibid*, 41-42.

⁶³ *Tabb C. J.*, *Law of Bankruptcy*, 5th ed., St. Paul, 2020, 41.

U.S. today, with some amendments.⁶⁴ The Bankruptcy Code replaced the term “bankrupt” with “debtor”, which is more neutral and less stigma is associated with it.⁶⁵

The Bankruptcy Code has nine chapters.⁶⁶ Generally, the majority of individuals file bankruptcy petitions under Chapter 7 or Chapter 13.⁶⁷ Under **Chapter 7** the debtor’s assets are liquidated and the creditors are paid on the pro-rata basis and the debtor is discharged.⁶⁸ On the other hand, in **Chapter 13** individual debtors pay to their creditors through court-confirmed prepayment plans and receive discharge only after completion of the plan.⁶⁹

3.2. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA)

BAPCPA was one of the most comprehensive amendments of the Bankruptcy Code since 1978.⁷⁰ Professor Charles J. Tabb states that much of BAPCPA was written by two lobbyists – **the credit industry** and **the auto industry**.⁷¹ On the other hand, bankruptcy professionals, like judges, professors, and attorneys – who were actively involved in other bankruptcy law amendments, were ignored by Congress.⁷² Professor Tabb also alleges that the interested industries spent millions of dollars on campaign contributions that funded President Bush and key members of Congress.⁷³ This resulted in some provisions, which **worsened the rights of debtors**.⁷⁴

One of the primary goals of BAPCPA was to force debtors to stay away from **Chapter 7** (liquidation) and go towards **Chapter 13** (adjustment of debts for individual debtors), the reasoning was that they should pay as much as they could to receive discharge of the debts.⁷⁵ The justification behind BAPCPA was that many debtors were abusing bankruptcy laws and there were many serial filers.⁷⁶ They claimed that it was the result of **the reduced stigma**.⁷⁷ Despite much data suggesting

⁶⁴ Ibid.

⁶⁵ *Tabb C. J.*, The Top Twenty Issues in the History of Consumer Bankruptcy, University of Illinois Law Review, Vol. 2007, №1, 2007, 29.

⁶⁶ The chapters of the Bankruptcy Code are: Chapter 1 – General Provisions; Chapter 3 – Case Administration; Chapter 5 – Creditors, The Debtors and The Estate; Chapter 7 – Liquidation; Chapter 9 – Adjustment of the Debts of Municipality; Chapter 11 – Reorganization; Chapter 12 – Adjustment of Debts of A Family Farmer Or Fisherman With Regular Annual Income; Chapter 13 – Adjustment of Debts of An Individual With Regular Income; Chapter 15 – Ancillary and Other Cross-Border Cases. Chapters 1, 5, and 5 apply to all kinds of bankruptcy cases, and the other chapters deal with specific types of debtors and reliefs.

⁶⁷ *Aberasturi J.*, Trouble with BAPCPA: A Call for Statutory Reform regarding Retirement Contributions in Chapter 13 Bankruptcy Plans, American Bankruptcy Institute Law Review, Vol. 30, №2, 2022, 280.

⁶⁸ *Tabb C. J.*, Law of Bankruptcy, 5th ed., St. Paul, 2020, 88-92.

⁶⁹ Ibid, 98-103.

⁷⁰ *Ramsay I.*, U.S. Exceptionalism, Historical Institutionalism, and the Comparative Study of Consumer Bankruptcy Law, Temple Law Review, Vol. 87, №4, 2015, 969.

⁷¹ *Tabb C. J.*, Law of Bankruptcy, 5th ed., St. Paul, 2020, 50.

⁷² Ibid.

⁷³ Ibid.

⁷⁴ Ibid, 47.

⁷⁵ *Jones D. R.*, Savings: The Missing Element in Chapter 13 Bankruptcy Cases, American Bankruptcy Institute Law Review, Vol. 26, №2, 2018, 244.

⁷⁶ *Greene S. S.*, The Failed Reform: Congressional Crackdown on Repeat Chapter 13 Bankruptcy Filers,

otherwise, the credit industry convinced Congress, that there was widespread abuse of the bankruptcy system from the side of individual debtors.⁷⁸ BAPCPA went into effect on 17 November 2005.⁷⁹ Among other changes, it added a **compulsory credit counseling** requirement for individual debtors.⁸⁰ The counseling would give recommendations to the debtors on what options they have in bankruptcy.⁸¹

Overall, the 2005 Act was not friendly to individual debtors and enacted changes in legislation that made it harder for individuals to get a “fresh start”.⁸² In order to force debtors into Chapter 13 proceedings (instead of Chapter 7), BAPCPA introduced the “**means test**” to determine their alternatives in bankruptcy.⁸³ “Means test’s” aim is to stop so-called “**can-pay**” debtors from filing for bankruptcy under Chapter 7.⁸⁴

3.3. Chapter 7- Liquidation

Chapter 7 cases are sometimes called “**straight liquidation**” cases.⁸⁵ A debtor under Chapter 7 can be an individual, partnership or corporation.⁸⁶ Individual debtors file under Chapter 7 to be discharged of their debts.⁸⁷ The debtors surrender their **nonexempt assets** to a trustee, which sells them and distributes the proceedings to the creditors.⁸⁸ On the other hand, the debtor keeps exempt assets and is discharged from pre-bankruptcy claims.⁸⁹

Individual Chapter 7 cases can be **voluntary** – meaning filed by the debtor or **involuntary** – filed by the creditors.⁹⁰ In case of involuntary filing, the creditors must prove one of the statutorily determined grounds, from which, the most common is not paying debts when they become due.⁹¹ Filing the case invokes **automatic stay**, which is one of the most important features of bankruptcy.⁹²

American Bankruptcy Law Journal, Vol. 89, №2, 2015, 242.

⁷⁷ *Tabb C. J.*, Law of Bankruptcy, 5th ed., St. Paul, 2020, 47-48.

⁷⁸ *Sousa M.D.*, The Principle of Consumer Utility: A Contemporary Theory of the Bankruptcy Discharge, University of Kansas Law Review, Vol. 58, №10, 2010, 594.

⁷⁹ *Tabb C. J.*, Law of Bankruptcy, 5th ed., St. Paul, 2020, 50.

⁸⁰ *Ibid.*, 128.

⁸¹ *Ibid.*

⁸² *McDonald G. K.*, Homelessness in the COVID Era: Utilizing the Bankruptcy Solution, Yale Law & Policy Review, Vol. 41, №1, 2022, 150.

⁸³ *Jones D. R.*, Savings: The Missing Element in Chapter 13 Bankruptcy Cases, American Bankruptcy Institute Law Review, Vol. 26, №2, 2018, 244.

⁸⁴ *Tabb C. J.*, The Death of Consumer Bankruptcy in the United States, Bankruptcy Developments Journal, Vol. 18, №1, 2001, 10.

⁸⁵ *Michael T. L.*, There's a Storm a Brewin': The Ethics and Realities of Paying Debtors' Counsel in Consumer Chapter 7 Bankruptcy Cases and the Need for Reform, American Bankruptcy Law Journal, Vol. 94, №3, 2020, 389.

⁸⁶ *Clarkson K. W. and others*, Business Law: Text and Cases, 11th ed, Mason (U.S.), 2009, 612.

⁸⁷ *Tabb C. J.*, Law of Bankruptcy, 5th ed., St. Paul, 2020, 91.

⁸⁸ *Ibid.*, 88.

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² *Sepinuck S. L., Duhl G. M.*, Problems and Materials on Bankruptcy Law and Practice, 3rd ed., St. Paul,

The automatic stay has the effect equivalent to an injunction, it automatically restrains the creditors from taking any further actions to collect their debts or enforce their liens.⁹³ It is believed, that automatic stay preserves the status quo.⁹⁴

Automatic stay terminates when the particular property is no longer property of the bankruptcy estate or when the bankruptcy case is closed.⁹⁵ The 2005 amendments added two new grounds for the termination of automatic stay: when the debtor has filed a bankruptcy case, which was dismissed within one year of filing the present case automatic stay terminates 30 days after the filing unless good faith of the debtor is shown.⁹⁶ The second ground is when the debtor had two or more bankruptcy cases filed in the past year.⁹⁷

3.4. Property of the Estate and Exempt Property

After the filing of the case **bankruptcy estate** is formed, it includes all the debtor's property and forms the property of the estate.⁹⁸ The trustee should liquidate the property and pay from this money to the creditors.⁹⁹ It is important to highlight, that Chapter 7 bankruptcy estate does not include any future income of the debtor after the filing for bankruptcy.¹⁰⁰ We should keep in mind, that there are many instances of “no-asset” scenarios in individual Chapter 7 bankruptcy cases.¹⁰¹

By exemption, we mean property that is exempt (free) from the bankruptcy estate. The justification behind the statutorily protected **exempt property** is that the debtors need some property to stay active members of society, to continue their professional work, also some properties can have no value to creditors and finally, there are some exempt properties with value, but which can have a specific sentimental attachment to the debtor.¹⁰²

Exemptions can be used by debtors in Chapter 7 and Chapter 13, each state has its own exemptions but there are also federal exemption rules.¹⁰³ In some states, debtors can choose between federal and state exemptions, but once they choose a set of exemptions they cannot apply some exemptions from the other set.¹⁰⁴ The most important for individuals is a “**homestead exemption**”.¹⁰⁵

2017, 28.

⁹³ Ibid, 45.

⁹⁴ Ibid, 28.

⁹⁵ *Epstein D. G.*, *Bankruptcy and Related Laws in a Nutshell*, 9th ed., St. Paul, 2017, 49-50.

⁹⁶ Ibid.

⁹⁷ Ibid.

⁹⁸ Tabb C. J., *Law of Bankruptcy*, 5th ed., St. Paul, 2020, 88.

⁹⁹ Ibid, 89.

¹⁰⁰ *Sepinuck S. L., Duhl G. M.*, *Problems and Materials on Bankruptcy Law and Practice*, 3rd ed., St. Paul, 2017, 30.

¹⁰¹ “Only 7% (169) of the 2,500 individual Chapter 7 cases examined were asset cases.”, *Jimenez D.*, *The Distribution of Assets in Consumer Chapter 7 Bankruptcy Cases*, *American Bankruptcy Law Journal*, Vol. 83, №4, 2009, 800.

¹⁰² *Sepinuck S. L., Duhl G. M.*, *Problems and Materials on Bankruptcy Law and Practice*, 3rd ed., St. Paul, 2017, 137.

¹⁰³ <<https://www.justia.com/bankruptcy/exemptions/>> [3.06.2023].

¹⁰⁴ Ibid.

¹⁰⁵ Epstein D. G. and others, *Bankruptcy: Dealing with Financial Failure for Individuals and Businesses*, 4th

We can say, that the “homestead” exemption gives individuals the opportunity not to stay homeless and retain a “fresh start”. Example of a federal exemption is: “homestead” – 27 900 \$; jewelry – 1 875 \$; household goods – 14 875 \$ (per item up to 700 \$); motor vehicle – 4 450 \$.¹⁰⁶

3.5. Dismissal of Chapter 7 Case and “Means Test”

A Chapter 7 liquidation case may be dismissed for “**cause**” as the Bankruptcy Code states.¹⁰⁷ The term “cause” is not defined by the code, but statutorily given examples show that a case can be dismissed because of the lack of debtor’s cooperation to support the filing.¹⁰⁸ The 1978 Code intended to permit debtors to choose under which Chapter to proceed not looking at the future income and ability to pay the creditors out of it.¹⁰⁹

Since 1984 the courts could dismiss Chapter 7 cases if they found “**substantial abuse**”, but there was a presumption in favor of granting relief to the debtors.¹¹⁰ In 2005, the test changed to simple “**abuse**”, also the presumption in favor of the debtor was eliminated.¹¹¹ Individual debtors now have to go through the “**means test**” to decide whether their case should be dismissed as abusive or not.¹¹²

To establish abuse with the “means test”, the debts should be **primarily consumer debts**.¹¹³ There are 2 stages of the means test: firstly, the debtor’s **monthly income is compared to the median monthly income** in the state, where the debtor resides depending on the household size (adjusted to it); if it is below the median the presumption of abuse does not arise and the debtor can proceed in Chapter 7.¹¹⁴ If the debtor’s income is more than the median income “the court calculates the debtor’s **disposable income** by reducing the debtor’s “current monthly income” by certain specified deductions for living expenses.”¹¹⁵

If disposable income in the next 60 months is less than 6 000 \$, the presumption of abuse does not arise, but if it is more than 10 000 \$ the presumption arises.¹¹⁶ And if the disposable income for the next 60 months is between 6 000 \$ and 10 000 \$ if it is sufficient to at least pay 25 % of the debtor’s

ed., St. Paul, 2015, 165.

¹⁰⁶ “These values are current as of 2022. Federal bankruptcy exemption values adjust every three years.”, <<https://www.justia.com/bankruptcy/exemptions/federal-bankruptcy-exemptions/>> [3.06.2023].

¹⁰⁷ U.S. Bankruptcy Code, paragraph 707 (a).

¹⁰⁸ *Tabb C. J.*, Law of Bankruptcy, 5th ed., St. Paul, 2020, 168.

¹⁰⁹ *Ibid.*, 169.

¹¹⁰ *Spurr S. J. & Ball K. M.*, The Effects of a Statute (BAPCPA) Designed to Make It More Difficult for People to File for Bankruptcy, American Bankruptcy Law Journal, Vol. 87, №1, 2013, 30.

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ *Tabb C. J.*, Law of Bankruptcy, 5th ed., St. Paul, 2020, 172.

¹¹⁴ *Spurr S. J. & Ball K. M.*, The Effects of a Statute (BAPCPA) Designed to Make It More Difficult for People to File for Bankruptcy, American Bankruptcy Law Journal, Vol. 87, №1, 2013, 30.

¹¹⁵ *Ibid.*, 30-31.

¹¹⁶ Numbers are adjusted based on the current Bankruptcy Code paragraph 707(b) (2)(A)(i), *Sepinuck S. L., Duhl G. M.*, Problems and Materials on Bankruptcy Law and Practice, 3rd ed., St. Paul, 2017, 46.

nonpriority, unsecured claims, then there is a presumption of abuse.¹¹⁷ In case of presumption of abuse, the case can be dismissed, or with the debtor's consent, it can be converted to Chapter 13 or Chapter 11 case.¹¹⁸

The presumption of abuse can be rebutted, the courts may consider the “**totality of the circumstances**” and the “**good faith**” of the debtor.¹¹⁹ “Even if the presumption of abuse does not arise or is rebutted, the court may dismiss the chapter 7 case if the “totality of the circumstances” demonstrates abuse or the debtor filed the petition “in bad faith.”¹²⁰

3.6. Exceptions from Discharge

Even when the debtor receives the discharge, it does not free him from all the obligations.¹²¹ Firstly, we should keep in mind that bankruptcy discharges obligations that fit in the code's definition of “debt”, but this definition is quite broad and almost all obligations can fit in it.¹²² Also, it is necessary that the debt should have arisen before the bankruptcy.¹²³

Not all debts can be discharged, the Bankruptcy Code (paragraph 523) sets out detailed rules about obligations which are exceptions to discharge. It is no surprise, that **certain taxes** are non-dischargeable because of their public nature.¹²⁴ Even if a debtor incurs credit card debt to pay non-dischargeable taxes, the portion of the debt which was used to pay them will be excepted from discharge.¹²⁵ Also, **debts based on fraud** are excepted from discharge, in order to protect innocent parties.¹²⁶ The debtor has to schedule a debt for the court to inform the creditors, unscheduled debts are not discharged.¹²⁷

Debts arising from ‘**willful or malicious injury**’, **governmental fines and penalties**, **criminal restitutions**, and **educational loans** are nondischargeable.¹²⁸ Congress keeps adding exceptions and now there are nineteen exceptions in paragraph 523 and several more exclusions in the other parts of the code.¹²⁹ We should also highlight, that discharge does not protect co-debtors and does not affect liens.¹³⁰

¹¹⁷ Ibid.

¹¹⁸ Bankruptcy Code, paragraph 707(b)(1).

¹¹⁹ *Sepinuck S. L., Duhl G. M.*, Problems and Materials on Bankruptcy Law and Practice, 3rd ed., St. Paul, 2017, 45.

¹²⁰ *Spurr S. J. & Ball K. M.*, The Effects of a Statute (BAPCPA) Designed to Make It More Difficult for People to File for Bankruptcy, *American Bankruptcy Law Journal*, Vol. 87, №1, 2013, 31.

¹²¹ *Epstein D. G.*, Bankruptcy and Related Laws in a Nutshell, 9th ed., St. Paul, 2017, 243.

¹²² Ibid.

¹²³ *Tabb C. J.*, Law of Bankruptcy, 5th ed., St. Paul, 2020, 946.

¹²⁴ Ibid, 967.

¹²⁵ *Epstein D. G.*, Bankruptcy and Related Laws in a Nutshell, 9th ed., St. Paul, 2017, 246.

¹²⁶ *Tabb C. J.*, Law of Bankruptcy, 5th ed., St. Paul, 2020, 970.

¹²⁷ Ibid, 979.

¹²⁸ Ibid, 985, 990-992.

¹²⁹ Ibid, 999.

¹³⁰ *Epstein D. G.*, Bankruptcy and Related Laws in a Nutshell, 9th ed., St. Paul, 2017, 255-56.

3.7. Chapter 13 – Adjustment of Debts of an Individual with Regular Income

Chapter 13 is intended as a **rehabilitation for individual consumer debtors**.¹³¹ It permits the debtor to retain the property and repay the creditors according to the plan approved by the court over three to five years.¹³² Before the enactment of the “means test”, it was generally used by those, who would lose assets in Chapter 7 liquidation proceedings.¹³³ Nevertheless, after the enactment of the “means test” many debtors are imposed to proceed under Chapter 13.¹³⁴ An individual is eligible for Chapter 13 if his combined total debts (secured and unsecured) are less than 2 750 000 \$.¹³⁵

Any individual with regular income can file for bankruptcy under Chapter 13.¹³⁶ It is important to highlight, that unlike Chapter 7, Chapter 13 can be **only voluntary**, but the debtor can be forced to go under the given chapter if his liquidation case is dismissed or if it is converted to Chapter 11 reorganization.¹³⁷

The main feature of the given chapter is that the property remains in possession of the debtor.¹³⁸ Also, a trustee mainly has an administrative function – to pay the creditors the money paid by the debtors according to the court-approved plan.¹³⁹ The creditor voluntarily files for relief with the repayment plan and the court has the authority to confirm it.¹⁴⁰ The court examines the plan according to the “**best interests test**”, which requires debtors to pay the creditors no less than what they would receive in Chapter 7.¹⁴¹ While calculating this the court deducts all the costs that would be incurred in Chapter 7, like costs of administration and professionals the trustee will hire in case of liquidation.¹⁴²

Unlike in Chapter 7, here debtor bears the cost of the statutory commission towards the trustee, which is limited to the maximum of 10% of the distributions to be made under the plan.¹⁴³ Also, **inflation** should be taken into account, because 100 \$ now is not equal to 100 \$ after three or five years.¹⁴⁴ The courts are very inconsistent with calculating interest over the amount that would have

¹³¹ *Tabb C. J.*, Law of Bankruptcy, 5th ed., St. Paul, 2020, 1208.

¹³² *Ibid.*

¹³³ *Fisher J. D.*, Who Files for Personal Bankruptcy in the United States?, The Journal of Consumer Affairs, Vol. 53, №4, 2019, 2005.

¹³⁴ *Tabb C. J.*, Law of Bankruptcy, 5th ed., St. Paul, 2020, 99.

¹³⁵ U.S. Bankruptcy Code § 109(e).

¹³⁶ *Epstein D. G. and others*, Bankruptcy: Dealing with Financial Failure for Individuals and Businesses, 4th ed., St. Paul, 2015, 237.

¹³⁷ *Tabb C. J.*, Law of Bankruptcy, 5th ed., St. Paul, 2020, 1219.

¹³⁸ *Ibid.*, 100.

¹³⁹ *Ibid.*, 1221.

¹⁴⁰ *Ibid.*, 1228-29.

¹⁴¹ *Epstein D. G. and others*, Bankruptcy: Dealing with Financial Failure for Individuals and Businesses, 4th ed., St. Paul, 2015, 243.

¹⁴² *Ibid.*

¹⁴³ *Jones D. R.*, Savings: The Missing Element in Chapter 13 Bankruptcy Cases, American Bankruptcy Institute Law Review, Vol. 26, №2, 2018, 250.

¹⁴⁴ *Epstein D. G. and others*, Bankruptcy: Dealing with Financial Failure for Individuals and Businesses, 4th ed., St. Paul, 2015, 243.

been distributed under liquidation, some apply market rate, others contract rate or interest that applies to judgments.¹⁴⁵

There is a risk that during the period of the plan the debtor's financial situation, particularly income may change or debtors may have some unexpected expenses, which may affect the whole plan.¹⁴⁶ The abovementioned is the reason why many plans fail.¹⁴⁷

Discharge under Chapter 13 is granted after the debtor completes the payments according to the plan.¹⁴⁸ Almost all debts not dischargeable under Chapter 7 are also nondischargeable under Chapter 13, the only important difference is that in Chapter 13 a non-fraudulent tax claim is dischargeable.¹⁴⁹

The debtor may receive a **"hardship" discharge** in case he cannot complete the payments under the plan and it is due to the circumstances he should not be held accountable for.¹⁵⁰ Also, the creditors should have received as much as they would under Chapter 7 liquidation.¹⁵¹ Under the "hardship" discharge only the debts dischargeable under Chapter 7 are discharged.¹⁵²

Generally, in a Chapter 13 plan debtor can propose modifications to the **secured claim**, but the holders of the claim should agree for the plan to be confirmed.¹⁵³ However, the court can confirm the plan, even without the creditor's approval, as long as the amount to be paid to him is equal to the collateral which is used as a security.¹⁵⁴ With the help of **"cram down"** the debtor does not have to obtain secured creditors' consent and the court can confirm the plan without their consent.¹⁵⁵

The court can **"cram down"**¹⁵⁶ the amount 'to be paid to the holder of secured debt to the value of its collateral.'¹⁵⁷ The court cannot do this if the collateral is the automobile of personal use or if there is a home mortgage.¹⁵⁸ Also, the debtor would have to pay interest on the value of the collateral, because of the inflation.¹⁵⁹

3.8. Chapter 11 – Reorganization

Chapter 11 is generally referred to as **the business reorganization chapter**.¹⁶⁰ But Chapter 11 is not only limited to business debtors, the U.S. Supreme Court stated that individuals who are not

¹⁴⁵ Ibid.

¹⁴⁶ *Jones D. R.*, Savings: The Missing Element in Chapter 13 Bankruptcy Cases, *American Bankruptcy Institute Law Review*, Vol. 26, №2, 2018, 250, 245-46.

¹⁴⁷ Ibid, 253.

¹⁴⁸ *Tabb C. J.*, *Law of Bankruptcy*, 5th ed., St. Paul, 2020, 102.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid, 1027.

¹⁵¹ Ibid.

¹⁵² U.S. Bankruptcy Code, paragraph 1328(b)(2).

¹⁵³ *Epstein D. G.*, *Bankruptcy and Related Laws in a Nutshell*, 9th ed., St. Paul, 2017, 273.

¹⁵⁴ Ibid, 274-75.

¹⁵⁵ *Tabb C. J.*, *Law of Bankruptcy*, 5th ed., St. Paul, 2020, 1263.

¹⁵⁶ Bankruptcy lawyers, judges and professors use this term to describe court approval of the plan that affects the changes in the claim without the approval of the claim holder.

¹⁵⁷ *Epstein D. G.*, *Bankruptcy and Related Laws in a Nutshell*, 9th ed., St. Paul, 2017, 274-75.

¹⁵⁸ Ibid, 277.

¹⁵⁹ Ibid, 276.

¹⁶⁰ *Tabb C. J.*, *Law of Bankruptcy*, 5th ed., St. Paul, 2020, 92.

engaged in business can file for bankruptcy under Chapter 11.¹⁶¹ Generally, individual Chapter 11 case looks like Chapter 13, but there are some major differences in procedure.¹⁶² In Chapter 11, unlike Chapter 13 creditors enjoy the right to vote for the plan, so influence the plan quite a lot.¹⁶³ Also, Chapter 11 can be voluntary and involuntary, unlike Chapter 13.

Almost half of the individual debtors in 2013 had liabilities below Chapter 13 limits, but still chose to file under Chapter 11.¹⁶⁴ Individuals in Chapter 11 seem more likely to operate businesses, have a higher debt-to-income ratio, and have much more household income, but on the other hand, also have much more expenses.¹⁶⁵ That shows that they have substantial real estate and home mortgages, so maybe they want to extend plans beyond five years.¹⁶⁶

3.9. Student Loans

The 1978 Bankruptcy Code stated that educational loans¹⁶⁷ were nondischargeable unless “**undue hardship**” was proved.¹⁶⁸ Student loans are not dischargeable under any chapter up until today. Both private and federal student loans are protected with non-dischargeability.¹⁶⁹ The court of appeals set the requirements that are needed to establish “undue hardship” to discharge student loans.¹⁷⁰ “While this standard does not require the debtor to live in poverty, it subsequently does not allow for luxury expenses, and once the debtor had paid all necessary expenses, excess financial resources should be used to satisfy student loan debt.”¹⁷¹

The court of appeals in *In Re Mosley*, stated, that to establish “**hardship discharge**” it should be shown that: 1. “The debtor cannot maintain, based on current income and expenses a “minimal” standard of living.”; 2. “The additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans” and 3. “that the debtor has made good faith efforts to repay the loans.”¹⁷²

¹⁶¹ *Toibb v. Radloff*, 501 U.S. 157 (1991).

¹⁶² *Epstein D. G.*, *Bankruptcy and Related Laws in a Nutshell*, 9th ed., St. Paul, 2017, 348-49.

¹⁶³ *Tabb C. J.*, *Law of Bankruptcy*, 5th ed., St. Paul, 2020, 1216.

¹⁶⁴ *Hynes R. M.*, *Lawton A. & Howard M.*, *National Study of Individual Chapter 11 Bankruptcies*, *American Bankruptcy Institute Law Review*, Vol. 25, №1, 2017, 164.

¹⁶⁵ *Ibid*, 66.

¹⁶⁶ *Ibid*, 164.

¹⁶⁷ The terms “student loans” and “educational loans” are used interchangeably in legal literature, the code uses term “educational”.

¹⁶⁸ *Keith C. A.*, *A Forced Crisis: Why Student Loan Debt Should Be Separately Classified under Chapter 13 Bankruptcy Plans*, *Delaware Journal of Corporate Law*, Vol. 44, №2-3, 2020, 253.

¹⁶⁹ *Taylor A. N. & Sheffner D. J.*, *Oh, What a Relief It (Sometimes) Is: An Analysis of Chapter 7 Bankruptcy Petitions to Discharge Student Loans*, *Stanford Law & Policy Review*, Vol. 27, N2, 2016, 303.

¹⁷⁰ *Brunner v. N.Y. State Higher Educ. Servs. Corp.* – 831 F.2d 395 (2d Cir. 1987).

¹⁷¹ *Keith C. A.*, *A Forced Crisis: Why Student Loan Debt Should Be Separately Classified under Chapter 13 Bankruptcy Plans*, *Delaware Journal of Corporate Law*, Vol. 44, №2-3, 2020, 255.

¹⁷² *In re Mosley*, 494 F.3d 1320 (11th Cir. 2007).

3.10. Retirement Contributions

Retirement contribution plans, referred to as 401(k) plans are very popular in the U.S.¹⁷³ The problem that arises in bankruptcy is whether these voluntary retirement contributions should be excluded from disposable income.¹⁷⁴ The **disposable income** is used to calculate how much can you pay to your debtors in Chapter 13.¹⁷⁵

There are 3 approaches the courts use: 1. All post-petition contributions are included in disposable income; 2. Only the amount contributed before filing the case is permitted to be contributed again and so not be considered in disposable income; and 3. Both post and pre-petition contributions are excluded from projected disposable income as long as the debtor's "good faith" is seen.¹⁷⁶ Overall, it is clear that statutory reform is needed to regulate the abovementioned issues.

Whether a debtor can exclude voluntary contributions to a retirement plan under Chapter 7 when calculating the income is also an actual question.¹⁷⁷ The code does not specify which expenses are considered reasonably necessary.¹⁷⁸ The court of appeals stated, that bankruptcy courts have the discretion in determining whether retirement contributions are reasonably necessary expenses and they should take into account: the age and income of the debtor; expected date of retirement; the amount of contributions; overall savings and any other relevant factors.¹⁷⁹ We should remember that the Code aims to give debtors a "fresh start", but not to let "can-pay" debtors use bankruptcy and not repay their creditors.

3.11. Future Developments

Bankruptcy is an **economic and social legislation**, so it is no surprise that it is often amended with the change in economic and social realities. Last year, **The Consumer Bankruptcy Reform Act of 2022** was introduced in Congress, which aims to make quite big changes in the individual bankruptcy system in the U.S.¹⁸⁰ We should highlight, that the bill is set to eliminate multiple forms of consumer bankruptcy and replace them with **new Chapter 10**.¹⁸¹ The authors of the bill suggest that it will be easier for debtors to go to one chapter than to choose between several chapters.¹⁸² Consumers

¹⁷³ *Aberasturi J.*, Trouble with BAPCPA: A Call for Statutory Reform regarding Retirement Contributions in Chapter 13 Bankruptcy Plans, *American Bankruptcy Institute Law Review*, Vol. 30, №2, 2022, 280.

¹⁷⁴ *Ibid*, 282.

¹⁷⁵ See definition of disposable income – U.S. Bankruptcy Code, paragraph 1325(2).

¹⁷⁶ *Aberasturi J.*, Trouble with BAPCPA: A Call for Statutory Reform regarding Retirement Contributions in Chapter 13 Bankruptcy Plans, *American Bankruptcy Institute Law Review*, Vol. 30, №2, 2022, 282.

¹⁷⁷ *Clarkson K. W.* and others, *Business Law: Text and Cases*, 11th ed, Mason (U.S.), 2009, 614.

¹⁷⁸ *Hebbring v. Trustee*, 463 F.3d 902 (9th Cir. 2006).

¹⁷⁹ *Ibid*.

¹⁸⁰ Congress web-page <<https://www.congress.gov/bill/117th-congress/senate-bill/4980?s=1&r=96>> [9.06.2023].

¹⁸¹ Kelley Kaplan & Eller Law Firm web-page <<https://www.kelleylawoffice.com/consumer-bankruptcy-reform-act-of-2022-what-to-know/>> [9.06.2023].

¹⁸² Bloomberg Law <<https://news.bloomberglaw.com/bankruptcy-law/consumer-bankruptcy-overhaul-envisioned-in-new-bill-explained-1>> [9.06.2023].

with debts under 7.5 million US dollars will go into two paths under the new chapter, some will get discharged of their debts, and others – with above 135 % of the median income will have to repay partially their creditors.¹⁸³

Overall, we can say, it will be a modification of Chapters 7 and 13 in one chapter. But there will also be some other changes, student loans and some other non-dischargeable debts will be discharged easier.¹⁸⁴ “The bill also would ease debtors’ ability to keep their homes and cars.”¹⁸⁵ The bill also removes the requirement of credit counseling and creates the Consumer Financial Protection Bureau which would operate like a special ombudsman, taking bankruptcy complaints.¹⁸⁶

Let’s see if the bill will be enacted by Congress and become effective legislation, but we should for sure look forward to some amendments in the individual bankruptcy legislation because economic and social situations change very fast and the legislation needs to answer the contemporary needs of the society.

4. Consumer Insolvency in Germany

4.1. Overview and Eligibility for Consumer Insolvency Proceedings in Germany

By the end of the 20th century, household debt was rising and it resulted in the enactment of personal bankruptcy laws in many European countries.¹⁸⁷ In Germany, they introduced consumer insolvency proceedings in 1999.¹⁸⁸ As we see, German consumer insolvency is quite a new phenomenon compared to U.S. individual bankruptcy, which has a history of more than a century.

Insolvency proceedings in Germany are regulated by the Insolvency Code (InsO).¹⁸⁹ There are two kinds of insolvency proceedings in InsO: regular insolvency proceedings and consumer insolvency proceedings.¹⁹⁰

Consumer insolvency proceedings in Germany are divided into three stages: **out-of-court debt settlement proceedings, in-court debt settlement proceedings, and consumer insolvency proceedings.**¹⁹¹

Consumer insolvency proceedings can be opened only if a certificate by a suitable person or agency proves that the debtor attempted to reach an agreement with creditors but failed to do so.¹⁹² After that, the debtor can file for insolvency proceedings, he should **include a plan for the settlement**

¹⁸³ Ibid.

¹⁸⁴ Ibid.

¹⁸⁵ Ibid.

¹⁸⁶ Ibid.

¹⁸⁷ *Er M.*, The German Consumer Bankruptcy Law and Moral Hazard – The Case of Indebted Immigrants, *Journal of Financial Regulation and Compliance*, Vol.28, №2, 2020, 161.

¹⁸⁸ Ibid, 162.

¹⁸⁹ Official English Translation of InsO, <https://www.gesetze-im-internet.de/englisch_inso/englisch_inso.html> [9.06.2023].

¹⁹⁰ *Braun S.*, German Insolvency Act: Special Provisions of Consumer Insolvency Proceedings and the Discharge of Residual Debts, *German Law Journal*, Vol. 7, №6, 2006, 61.

¹⁹¹ *Braun/Buck*, *German Insolvency Code: Article-by-Article Commentary*, 2nd ed., Munich, 2019, 793.

¹⁹² *Bork R.*, *Corporate Insolvency Law: A Comparative Textbook*, Cambridge/Antwerp/Chicago, 2020, 207.

of debts with the application about opening insolvency proceedings.¹⁹³ Creditors have access to that plan and can object to it.¹⁹⁴ Here, the court tries to mediate, but the debtors generally offer nothing so cannot agree with creditors, because under insolvency proceedings the debtors would have to work for three years and try to pay the creditors that way.¹⁹⁵ The creditors afterward vote on the plan like it is in restructuring proceedings, but without having a formal meeting.¹⁹⁶

The court opens insolvency proceedings only if both, out-of-court and in-court debt settlement proceedings have failed.¹⁹⁷ So, these consumer proceedings are aimed at making the parties reach an agreement.¹⁹⁸

To qualify for consumer insolvency, the individual debtor should satisfy the code's requirements set out in InsO.¹⁹⁹ Consumer insolvency proceedings apply only to **natural persons** who do not pursue self-employed economic activity.²⁰⁰ Also, the person should not have pursued self-employed economic activity in the past, meaning entrepreneurs who closed down their business shortly before filing for insolvency proceedings are not eligible.²⁰¹

On the other hand, InsO lets the debtor who pursued self-employed economic activity file under consumer insolvency proceedings if the debtor has fewer than twenty creditors and there are no employment claims against him.²⁰² If you meet the requirements of being a consumer you qualify for consumer insolvency proceedings and it does not matter how much income you have.²⁰³

Consumer insolvency proceedings are **simplified proceedings**, they are generally in writing.²⁰⁴ Usually, the request for starting the proceedings is filed by the consumers, it is hard to find a creditor who applies for insolvency proceedings against a consumer debtor, because they have no assets and it does not make sense for the creditor to initiate the proceedings.²⁰⁵

4.2. The Procedural Details of Consumer Insolvency

Once the debtor is declared bankrupt the **trustee** is appointed for three years, which supervises the financial affairs of the debtor.²⁰⁶ Debtors' assets are sold by the trustee to satisfy the creditors.²⁰⁷

¹⁹³ Ibid.

¹⁹⁴ Ibid.

¹⁹⁵ Interview with Reinhard Bork, Emeritus Professor, Faculty of Law, Hamburg University (Hamburg, Germany, 21 March 2023).

¹⁹⁶ Ibid.

¹⁹⁷ *Braun/Buck*, German Insolvency Code: Article-by-Article Commentary, 2nd ed., Munich, 2019, 793.

¹⁹⁸ Interview with Reinhard Bork, Emeritus Professor, Faculty of Law, Hamburg University (Hamburg, Germany, 21 March 2023), *See also* InsO, Section 287 (2).

¹⁹⁹ InsO, Section 304.

²⁰⁰ *Braun/Buck*, German Insolvency Code: Article-by-Article Commentary, 2nd ed., Munich, 2019, 793.

²⁰¹ *Bork R.*, Corporate Insolvency Law: A Comparative Textbook, Cambridge/Antwerp/Chicago, 2020, 204.

²⁰² Ibid.

²⁰³ Interview with Reinhard Bork, Emeritus Professor, Faculty of Law, Hamburg University (Hamburg, Germany, 21 March 2023).

²⁰⁴ *Braun/Buck*, German Insolvency Code: Article-by-Article Commentary, 2nd ed., Munich, 2019, 793.

²⁰⁵ Interview with Reinhard Bork, Emeritus Professor, Faculty of Law, Hamburg University (Hamburg, Germany, 21 March 2023).

²⁰⁶ *Er M.*, The German Consumer Bankruptcy Law and Moral Hazard – The Case of Indebted Immigrants,

The exempt property that cannot be liquidated is defined by InsO, which also refers to the Code of Civil Procedure.²⁰⁸

In Germany, natural persons who apply for discharge can also apply for the postponement to pay the costs of the proceeding until the discharge is awarded, if the debtor's assets are not sufficient to cover the costs.²⁰⁹ Also, we should mention that the debtor faces some disadvantages after the insolvency proceedings, it will be hard for him to enter the general credit protection agency (SCHUFA) for three years.²¹⁰ He also will not be permitted to be an executive manager or managing director for some time.²¹¹

4.3. Discharge

In Germany, **discharge proceedings** are connected to **insolvency proceedings**, and only natural persons are entitled to discharge.²¹² Unlike the U.S., in Germany, the debtor should **apply separately** for the discharge.²¹³ The debtor should apply for the discharge simultaneously with the application of insolvency proceedings.²¹⁴ If the creditors have applied for insolvency proceedings the debtor should apply for discharge within two weeks after being notified about the application of insolvency proceedings against him.²¹⁵

All debtors can request the **discharge of residual debts**, even those whose creditors did not receive anything during the insolvency proceedings.²¹⁶ Residual debts are the unsatisfied part of the claims owed by the debtors after the termination of insolvency proceedings.²¹⁷ Discharge application is not permitted for the debtors if they have been granted a discharge in the past eleven years or if they have been denied a discharge in the past three or five years, depending on what the refusal was based on.²¹⁸

After filing for insolvency, there is a **compliance period** that starts with the opening of insolvency proceedings and runs for three years.²¹⁹ During this period debtor must cooperate with the trustee and engage or at least try to get engaged in employment activities.²²⁰ The part of the income (the legislation defines the sum below which cannot be taken from the debtor) is given to the trustee,

Journal of Financial Regulation and Compliance, Vol.28, №2, 2020, 166.

²⁰⁷ Interview with Reinhard Bork, Emeritus Professor, Faculty of Law, Hamburg University (Hamburg, Germany, 21 March 2023).

²⁰⁸ See InsO, Section 36.

²⁰⁹ InsO, Section 4a(1).

²¹⁰ *Er M.*, The German Consumer Bankruptcy Law and Moral Hazard – The Case of Indebted Immigrants, Journal of Financial Regulation and Compliance, Vol.28, №2, 2020, 167.

²¹¹ *Ibid.*

²¹² *Bork R.*, Corporate Insolvency Law: A Comparative Textbook, Cambridge/Antwerp/Chicago, 2020, 194-95.

²¹³ *Braun/Pehl*, German Insolvency Code: Article-by-Article Commentary, 2nd ed., Munich, 2019, 779-80.

²¹⁴ InsO, Section 287(1).

²¹⁵ *Ibid.*

²¹⁶ *Braun/Pehl*, German Insolvency Code: Article-by-Article Commentary, 2nd ed., Munich, 2019, 779.

²¹⁷ *Bork R.*, Corporate Insolvency Law: A Comparative Textbook, Cambridge/Antwerp/Chicago, 2020, 191.

²¹⁸ *Ibid.*, 196, See also InsO, section 278a (2).

²¹⁹ *Ibid.*, 197.

²²⁰ *Ibid.*, 198.

which distributes the money among the creditors according to the schedule of the claims.²²¹ If the debtors do not comply with the abovementioned rules the discharge can be denied based on the ordinary creditor's application for a rejection.²²² The debtor should only be granted a discharge of residual debt if he fulfilled the requirement and made the necessary sacrifices.²²³

Discharge in Germany only affects the **pre-commencement claims**, as it is in the U.S.²²⁴ InsO provides an exhaustive list of claims which are not dischargeable.²²⁵ Examples of non-dischargeable claims are fines and damages arising from intentional tort.²²⁶ Also, third parties are not affected by the discharge.²²⁷

The discharge proceedings in Germany can be seen as a **two-part process**: firstly, the court decides ex officio whether there is ground to refuse the debtor admissibility to the application of discharge and then the actual discharge proceedings begin, with the "**period of good conduct**", when the debtor is required to make effort to fulfill the liabilities.²²⁸

Dishonest individuals do not get discharged of their residual debts, they can go through insolvency proceedings and get their assets sold, but the creditors who were not paid from the liquidation of the assets will still have claims against the debtor.²²⁹ So, we can say, that it does not make sense for dishonest individuals to file for consumer insolvency. InsO gives the detailed grounds for the refusal of discharge, which are generally situations where the debtor is not acting or has not acted in good faith.²³⁰ The examples are if the debtor has received a final verdict from an insolvency-related criminal offense or has given false or incomplete information regarding their economic condition in writing to get a loan or grant from the public fund or to avoid payments to them.²³¹ InsO (section 295) also sets out debtors' obligations during the period of "good conduct" to get discharged, because the debtor's conduct matters a lot.²³²

4.4. General Remarks

Some scholars believe that consumer insolvency in Germany is not associated with substantial moral hazard or stigma.²³³ Professor Reinhard Bork agrees with them and states, that it is perceived

²²¹ Ibid, 198.

²²² Ibid.

²²³ *Braun/Pehl*, German Insolvency Code: Article-by-Article Commentary, 2nd ed., Munich, 2019, 780.

²²⁴ *Bork R.*, Corporate Insolvency Law: A Comparative Textbook, Cambridge/Antwerp/Chicago, 2020, 200.

²²⁵ See InsO, Section 302.

²²⁶ *Braun/Pehl*, German Insolvency Code: Article-by-Article Commentary, 2nd ed., Munich, 2019, 780.

²²⁷ *Bork R.*, Corporate Insolvency Law: A Comparative Textbook, Cambridge/Antwerp/Chicago, 2020, 201.

²²⁸ *Braun/Pehl*, German Insolvency Code: Article-by-Article Commentary, 2nd ed., Munich, 2019, 779-81.

²²⁹ Interview with Reinhard Bork, Emeritus Professor, Faculty of Law, Hamburg University (Hamburg, Germany, 21 March 2023).

²³⁰ *Braun/Pehl*, German Insolvency Code: Article-by-Article Commentary, 2nd ed., Munich, 2019, 783.

²³¹ *Bork R.*, Corporate Insolvency Law: A Comparative Textbook, Cambridge/Antwerp/Chicago, 2020, 196.

²³² *Braun/Pehl*, German Insolvency Code: Article-by-Article Commentary, 2nd ed., Munich, 2019, 785.

²³³ *Er M.*, The German Consumer Bankruptcy Law and Moral Hazard – The Case of Indebted Immigrants, *Journal of Financial Regulation and Compliance*, Vol.28, №2, 2020, 177.

more as a relief for unfortunate indebted individuals, than a stigma.²³⁴ The high number of consumer insolvency applications also show this trend.²³⁵

Overall, we can say that the specific characteristic of German individual insolvency is that it first tries to find an agreement between creditors and the debtor with out-of-court and in-court settlements. It also has **strict discharge rules** and a **3-year discharge period**.²³⁶ Also, consumer insolvency and discharge are separate proceedings, which is quite different from the U.S. approach.

When compared to the U.S., we can say that German insolvency has a **one-window principle**, offering one set of procedures with different steps to everyone satisfying the definition of “consumer”, while in the U.S. generally individual debtors apply to 2 different chapters with a completely different procedure. Also, unlike Germany, in the U.S., there is a homestead exemption so the debtor retains a place to live to have a “fresh start”. With all these differences shown we should agree with Professor Reinhard Bork who thinks, that generally, U.S. legal system is more debtor-friendly and German – creditor-friendly.²³⁷

5. Recommendations for the Introduction of an Individual Bankruptcy System in Georgia

5.1. Overview of the Georgian Bankruptcy System²³⁸

The first piece of legislation on bankruptcy law in Georgia was the 1996 Law of Georgia on Bankruptcy Proceedings.²³⁹ The 1996 law stated that bankruptcy proceedings could be opened on an individual person’s property or part of his property.²⁴⁰ Despite this, no cases or any scholarly material are discussing individual bankruptcy in Georgia, so we can consider it a “dead norm”.

Then in 2007, it was replaced by the Law of Georgia On Insolvency Proceedings.²⁴¹ The 2007 law stated that it did not regulate insolvency issues of natural persons, except for individual entrepreneurs.²⁴² The law also required that these **individual entrepreneurs** should have been established under The Law of Georgia on Entrepreneurs.²⁴³ Though, the representatives of the National Bureau of Enforcement (NBE) have stated that individuals whose obligations had not arisen

²³⁴ Interview with Reinhard Bork, Emeritus Professor, Faculty of Law, Hamburg University (Hamburg, Germany, 21 March 2023).

²³⁵ See Bork R., *Corporate Insolvency Law: A Comparative Textbook*, Cambridge/Antwerp/Chicago, 2020, 201.

²³⁶ Interview with Reinhard Bork, Emeritus Professor, Faculty of Law, Hamburg University (Hamburg, Germany, 21 March 2023).

²³⁷ Ibid.

²³⁸ For the purposes of this article U.S. nomenclature will be used, so the term bankruptcy will be used to describe and refer to Georgian system.

²³⁹ Law of Georgia on Bankruptcy Proceedings, Parliamentary Gazette, 19-20, 30/07/1996 (annulled 15.08.2007).

²⁴⁰ Ibid, Article 2(1).

²⁴¹ Law of Georgia on Insolvency Proceedings, LHG, 9, 31/03/2007 (annulled 01.04.2021).

²⁴² Ibid, Article 2(2)(a).

²⁴³ Ibid, Article 2(1).

from entrepreneurial activities have tried to register as individual entrepreneurs and to use insolvency proceedings of the individual entrepreneur in order to stop the enforcement process.²⁴⁴ So, they were attempting to misuse the availability of insolvency proceedings for individual entrepreneurs.

On 18 September 2020 **Law of Georgia on Rehabilitation and the Collective Satisfaction of Creditors' Claims** was enacted by the Parliament of Georgia and it went into force on 1 April 2021.²⁴⁵ According to current law, it does not regulate insolvencies of individual entrepreneurs and natural persons.²⁴⁶ We should highlight, that even individual entrepreneurs were taken out of the scope of the new law.²⁴⁷ Even though, the deputy minister of justice of Georgia confirmed in 2017 that they were considering regulating the insolvency process of natural persons to this day there is no such regulation.²⁴⁸

5.2. The Debtor Registry²⁴⁹

The Debtor Registry is a systemized electronic database.²⁵⁰ It aims to secure the **enforcement of monetary claims**, natural and legal persons are registered in that registry right away after they become the target of enforcement proceedings.²⁵¹ Debtors against whom the enforcement began after 1 January 2010 are registered in that registry by the National Bureau of Enforcement (NBE) of Georgia, and those against whom the enforcement began before that date can be registered by the initiative of the NBE.²⁵² The Debtor Registry is administered by NBE.²⁵³

The debtor is restricted from disposing of the property that he has registered under his name after being registered in the Debtor Registry.²⁵⁴ The debtor can only dispose the property with the approval of the creditor.²⁵⁵ The debtor's bank accounts are also seized, so this causes a lot of problems, they practically cannot participate in everyday economic activities.²⁵⁶

The identity of the debtors in the register is public and everyone can access it.²⁵⁷ The debtor can be registered there for 10 years.²⁵⁸ If after 2 years the claim is not enforced because there is no asset

²⁴⁴ *Gvelebiani J., Kochlashvili A., Amisulashvili N.*, Feasibility Study: On the Regulation of Personal Insolvency, Tbilisi, 2021, 38.

²⁴⁵ *Ibid*, 13.

²⁴⁶ Law of Georgia on Rehabilitation and the Collective Satisfaction of Creditors' Claims, Article 4(1)(a), Article 4(2)(a), 25/09/2020.

²⁴⁷ *Meskhishvili K. and others*, Basics of Insolvency Proceedings According to the Law of Georgia on Rehabilitation and the Collective Satisfaction of Creditors' Claims, Tbilisi, 2021, 27 (in Georgian).

²⁴⁸ Business Media Georgia, <<https://bm.ge/en/article/gadaxdisuunaroba-shesadzloa-fizikur-pirebzc-gavrceldes/15059>> [13.06.2023] (in Georgian).

²⁴⁹ The webpage of the registry, <https://nbe.gov.ge/index.php?sec_id=367&lang_id=ENG> [13.06.2023].

²⁵⁰ Law of Georgia on Enforcement Proceedings, Article 19¹(1), LHG, 13(20), 01/05/1999.

²⁵¹ *Ibid*.

²⁵² *Ibid*, Articles 19¹(1) and 19¹(1¹).

²⁵³ *Ibid*, Article 19¹(2).

²⁵⁴ *Ibid*, Article 19³.

²⁵⁵ *Ibid*, Article 19⁴(3).

²⁵⁶ *Ibid*, Article 19²(3).

²⁵⁷ *Ibid*, Article 19¹(4).

²⁵⁸ *Ibid*, Article 34(1).

from which it can be paid, enforcement will be stopped.²⁵⁹ However, the creditor can pay every year 200 Georgian Lari and extend the timeframe of enforcement up to a maximum of 10 years.²⁶⁰

So, for 10 years, almost 1/7 of a person's life, the creditors can seek to enforce their claims, and the debtor can be deprived of the will to participate in economic activity or to be employed.²⁶¹ This causes a lot of problems for individuals, apart from the **stigma** associated with it. As a rule, the indebted individuals are supported by friends, relatives, and neighbors.²⁶² So, we can say, that a quite long enforcement period and debtors' lack of seeking employment cause burdens for the whole society.

5.3. Possible Justifications in Support of Introducing Individual Bankruptcy in Georgia

Today in Georgia there is a **crisis of credit**.²⁶³ Natural persons take credits for different reasons and then to repay them take other credits on worse terms.²⁶⁴ It is stated, that in 2019 there were 158,422 natural persons registered in the Debtor Registry.²⁶⁵ It is more dramatic that one-fifth of the workforce in Georgia is either registered in the Debtors' Registry or on the list of bad debts in the banking sector.²⁶⁶ It is clear that all this impacts the overall economic stability of the country and can have a drastically negative effect over time.

We should also consider that indebted individuals not having the possibility to get discharged of their debts and not willing to seek employment thinking that all their income will be used to satisfy the claims against them for a long time may **promote the migration** of them. The migration of young people is already a problem in Georgia.²⁶⁷ I have an **initial hypothesis** that not having individual bankruptcy only promotes the migration of young individuals because they seek employment in foreign countries, trying to save their income from Georgian enforcement authorities.

The Constitution of Georgia states, that "Georgia is a **social state**".²⁶⁸ It gives the state responsibility to strengthen social justice and take care that natural persons have "the subsistence minimum and decent housing".²⁶⁹ There is no answer in the constitution on how to achieve the goal of

²⁵⁹ Ibid, Article 35(1¹).

²⁶⁰ Ibid, Article 35(1²).

²⁶¹ According to World Health Organization the average life expectancy in 2019 in Georgia was 73,3 years, <<https://data.who.int/countries/268>> [13.06.2023].

²⁶² *Gvelebiani J., Kochlashvili A., Amisulashvili N.*, Feasibility Study: On the Regulation of Personal Insolvency, Tbilisi, 2021, 76.

²⁶³ *Meskhishvili K. and others*, Basics of Insolvency Proceedings According to the Law of Georgia on Rehabilitation and the Collective Satisfaction of Creditors' Claims, Tbilisi, 2021, 27, (in Georgian).

²⁶⁴ Ibid.

²⁶⁵ <http://www.barristers.ge/ge/page/news_item/1388?fbclid=IwAR2moLIT0Y35U7VXBHJ6ljX_1X-Lw-GEjEWtY99HYbdSIFWbuJ95TK4GzGU> [15.06.2023] (in Georgian).

²⁶⁶ *Gvelebiani J., Kochlashvili A., Amisulashvili N.*, Feasibility Study: On the Regulation of Personal Insolvency, Tbilisi, 2021, 71.

²⁶⁷ National Statistics Office of Georgia, <<https://www.geostat.ge/en/modules/categories/322/migration>>, the positive migration rate in 2022 can be explained by Russian and Ukrainian emigrants after the war [15.06.2023].

²⁶⁸ Constitution of Georgia, Article 5, Departments of the Parliament, 31-33, 24/08/1995.

²⁶⁹ Ibid, Article 5 (2) and (4).

the declared social state, although the state has discretion on how to achieve the abovementioned goals and what to do.²⁷⁰ The dissenting opinion of the Constitutional Court states that the state is obliged to declare social rights by legislation and in case of poverty, provide an individual with basic means of subsistence.²⁷¹ Not doing so means that the state does not comply with its declared obligation to be a social state.²⁷²

We should remember that Bankruptcy law is a form of social legislation as much as it is an economic one.²⁷³ Having introduced individual bankruptcy in the legislation can be seen as a part of the country's duty taken by declaring in the constitution that it is a social state, and takes care of natural persons' social rights. We can also argue, that not having individual bankruptcy provisions can breach Article 9 of the Constitution, which guarantees the **protection of human dignity**.²⁷⁴

Moreover, according to the modern standards and experience of other countries, it is essential to have the insolvency of natural persons regulated by legislation.²⁷⁵ It is believed that giving individuals a “fresh-start” incentivizes them to **remain economically productive** and therefore contribute to the whole society.²⁷⁶ Introducing individual bankruptcy will have a positive effect on Georgia's economy as a whole if it is regulated properly according to the needs of Georgian social-economic reality.²⁷⁷ All the above mentioned justifies why Georgia should introduce an individual bankruptcy system in the legislation.

5.4. Recommendations to the Georgian Legislator About Key Issues of Individual Bankruptcy

Professor Reinhard Bork states that countries that are about to introduce individual bankruptcy systems should not make it very complicated, on the contrary, they should make it as easy as possible.²⁷⁸ He states that the individual insolvent debtor's affairs generally are not very complicated, the debtor does not have many assets, if anything at all.²⁷⁹ Professor Bork recommends finding **an easy discharge solution**, which will be fair for the creditors too.²⁸⁰

In Georgia individuals' bankruptcy is left without any regulation. There are two options for how to regulate individual bankruptcies: it can be regulated with the **general insolvency regulations** – as it

²⁷⁰ Decision of August 27, 2009, N1/2/434 of the Constitutional Court of Georgia, Dissenting opinion of Ketevan Eremadze and Besarion Zoidze (paragraph 9), (in Georgian).

²⁷¹ Ibid.

²⁷² Ibid.

²⁷³ Zywicki T. J., Bankruptcy Law as Social Legislation, Texas Review of Law & Politics, Vol. 5, №2, 2001, 429.

²⁷⁴ Constitution of Georgia, Article 9, Departments of the Parliament, 31-33, 24/08/1995.

²⁷⁵ Meskhishvili K. and others, Basics of Insolvency Proceedings According to the Law of Georgia on Rehabilitation and the Collective Satisfaction of Creditors' Claims, Tbilisi, 2021, 27, (in Georgian).

²⁷⁶ Byington J. S., The Fresh Start Canon, Florida Law Review, Vol. 69, №1, 2017, 121.

²⁷⁷ Gvelebiani J., Kochlashvili A., Amisulashvili N., Feasibility Study: On the Regulation of Personal Insolvency, Tbilisi, 2021, 55.

²⁷⁸ Interview with Reinhard Bork, Emeritus Professor, Faculty of Law, Hamburg University (Hamburg, Germany, 21 March 2023).

²⁷⁹ Ibid.

²⁸⁰ Ibid.

is in the U.S. and Germany, or a **special legal act** should be enacted that would regulate individual bankruptcies – this approach is taken by Lithuania.²⁸¹ In Lithuania, individual entrepreneurs registered by the law are also regulated by the same act as legal entities.²⁸²

Georgian legislators can consider combining individual bankruptcy provisions in the current law on Rehabilitation and the Collective Satisfaction of Creditors' Claims or enacting a separate legislative act. According to the deputy minister of Justice of Georgia in 2017 they were considering introducing an individual bankruptcy system through separate legal act.²⁸³

We can say, that since individual bankruptcy is a new phenomenon in Georgian society, it would be better to be regulated by a **separate legal act**, but it should be strongly in line with the insolvency regime established by the 2020 law. Also, even if individual bankruptcy is regulated by a separate legal act individual entrepreneurs should be still regulated with general insolvency regulation. So the new special regulations subjects should be **consumer debtors**.

The Georgian legislator should also decide whether to introduce the “**one window**” principle as it is in Germany, where the same provisions apply to all consumer debtors or separate rules should apply to different types of debtors according to their income, as it is in the U.S. Feasibility Study on the Regulation of Personal Insolvency in Georgia states, that it is better to deal with bankruptcy by rehabilitation and liquidating assets and discharging debts should be the last resort.²⁸⁴ We can say, that in principle both U.S. and German legislation try to incentivize parties to participate in repayment plans by different means.

As we have already stated, the system of individual insolvency should not be very complicated, the legislation can provide for some income threshold according to which the court will decide whether the debtor can repay creditors through a repayment plan, and the natural persons who are above that income threshold should be guided to the provisions that would regulate **repayment plan**, the others – below that threshold – should be guided to the provisions that would **liquidate** their assets and distribute the money to creditors on pro-rata basis. So, Georgian legislators can take the U.S. approach (see Subchapters 3.3 and 3.7.).

The debtor's **repayment plan should be denied**, if creditors do not get more than they would have gotten in case the debtor's assets were liquidated, as it is in U.S. Chapter 13. It would help to ab initio prevent some abuses by the debtors, which is crucial.

The legislation should provide for who is eligible for individual bankruptcy like in Germany InsO defines consumers (see Subchapter 4.1.). The new law should state that the debtor is eligible if he does not or did not pursue the self-employed activity. The law can make some exclusions for self-employed with low income (below some threshold).

²⁸¹ See generally Lithuanian model on individual insolvency, *Gvelebiani J., Kochlashvili A., Amisulashvili N.*, Feasibility Study: On the Regulation of Personal Insolvency, Tbilisi, 2021, 15-20.

²⁸² Ibid, 15.

²⁸³ Business Media Georgia, <<https://bm.ge/en/article/gadaxdisuunaroba-shesadzloa-fizikur-pirebzc-gavrceldes/15059>> [13.06.2023] (in Georgian).

²⁸⁴ *Gvelebiani J., Kochlashvili A., Amisulashvili N.*, Feasibility Study: On the Regulation of Personal Insolvency, Tbilisi, 2021, 40.

Discharge of debts for natural persons should be introduced to give them a “fresh-start”. The preamble of the new law can state the goal, that “**honest but unfortunate debtors**” should be given a second chance and the “fresh-start”. Discharge should be given after individuals complete the repayment plan, like in the U.S. Chapter 13, or after the liquidation of their assets. Also, the legislation can give debtors a period of up to three years, like it is in Germany, during which debtors should seek employment to at least partially repay their debts. In the Georgian legal community, some believe that introducing an individual bankruptcy system can give irresponsible debtors incentives to take credit without much thinking and responsibility, thinking that they can use the bankruptcy system opportunistically afterward.²⁸⁵ Such a “cooling off” period will ensure that such cases are eliminated to a minimum.

Also, the state should fund some kind of advertisements – TV and Radio commercials and other means of informational campaigns to educate the individual debtors about their rights under the new individual bankruptcy system. They should make sure to highlight that the new system is offered to “honest but unfortunate debtors” and it will not give dishonest individuals an easy way to not fulfill their obligations. Of course, Banks and microfinance organizations may start to check credit history and repayment chances more strictly, but the legislators should make sure that there is a balance between creditors' and debtors' interests and the bank's requirements are not overly strict, resulting in no individual being able to take the credit.

In Georgia the **courts should have the jurisdiction to grant discharge** and filing for the bankruptcy case should automatically turn into discharge proceedings when it is needed. The courts should have jurisdiction over whole individual bankruptcy proceedings. Enacting an individual bankruptcy system may result in a large number of cases, that already loaded first instance courts will have to hear. In the U.S. there are **special bankruptcy courts**, Georgian legislators can also consider establishing special first-instance courts for bankruptcy cases.

There is always some **exempt property** that is not subject to liquidation, Georgian Law on Enforcement Proceedings states such property too, and of course it should be taken into account when regulating exempt property of individuals in bankruptcy.²⁸⁶ It states that necessary personal and household items; for individuals engaged in agriculture – equipment and tools; the amount of minimum subsistence among others are exempt property, which cannot be taken or liquidated. The **subsistence minimum** in April of 2023 in Georgia was 251,8 Georgian Lari.²⁸⁷ We can say, that it is proof of the above-given hypotheses that insolvent individuals in Georgia have no incentives to seek employment, they would not want to work full-time and be left with a subsistence minimum, which will not cover their expenses.²⁸⁸ We can also presume, that all the above-mentioned can also give incentives to individuals to seek employment in such jobs, where they can work unofficially, without

²⁸⁵ *Meskhishvili K. and others*, Basics of Insolvency Proceedings According to the Law of Georgia on Rehabilitation and the Collective Satisfaction of Creditors' Claims, Tbilisi, 2021 27, (in Georgian).

²⁸⁶ See Georgian Law on Enforcement Proceedings, Article 45, LHG, 13(20), 01/05/1999.

²⁸⁷ National Statistics Office of Georgia <<https://www.geostat.ge/en/modules/categories/791/subsistence-minimum>> [14.06.2023].

²⁸⁸ *Gvelebiani J., Kochlashvili A., Amisulashvili N.*, Feasibility Study: On the Regulation of Personal Insolvency, Tbilisi, 2021, 46.

being registered with the tax authorities and paying taxes, so in the end the country's budget incurs a loss.

New individual bankruptcy legislation should create **a little more generous exempt property**, and individuals who will be able to participate in repayment plans should be given a chance to use a reasonable part of their income for expenses. The system should not leave individuals to live in poverty, but it should not necessarily give them the possibility to live in luxury.²⁸⁹ In the U.S. there is also a **homestead exemption**²⁹⁰ (see Subchapter 3.4.), which can also be considered by Georgian legislators not to leave insolvent debtors without a place to live.

The **proceedings costs** should be also reasonable and in case the debtor gets discharged the proceeding costs should also be discharged as it is in Germany. Also, the law may set **compulsory mediation** requirements for the debtors and creditors.

The legislators should come up with a regulation that will keep dishonest debtors from bankruptcy proceedings. The legislators can take that from German InsO and U.S. Bankruptcy Code, to keep debtors who have not acted with good faith out of bankruptcy proceedings.²⁹¹

The legislators should also regulate **non-dischargeable debts** exhaustively. They can take into account paragraph 523 of the U.S. bankruptcy code or German InsO Section 302, which we have discussed above. Also, the legislator should take into account exempt property declared by the Georgian Law on Enforcement Proceedings.

Georgian legislators can also establish some **official authority** that will be responsible for administrating and managing individual bankruptcy proceedings as the official authorities do in the U.S. and Germany. This authorities main function among others should be the liquidation of the debtor's assets or paying the creditors based on the debtors' repayment plans. Some argue that private enforcers or private insolvency practitioners can be more effective and faster solution for administering individual bankruptcy cases, but we should keep in mind that many cases are no-asset cases and they will not have financial incentives to manage the cases.²⁹²

6. Conclusion

In the U.S. individual debtors can file for bankruptcy under **Chapters 7, 11, and 13**. Generally, individuals file under Chapter 7 – **Liquidation** (see Subchapter 3.3), where their assets are sold and creditors are paid from it, or under Chapter 13 – **Adjustment of Debt of an Individual with Regular Income** (see Subchapter 3.7.), where the debtor represents a repayment plan and the court assesses and confirms it, then the debtor pays to the creditors according to the plan for 3 or 5 years. In Chapter 7 the debtor goes through the “**means test**” (see Subchapter 3.5.) which examines, whether he is eligible for

²⁸⁹ *Keith C. A.*, A Forced Crisis: Why Student Loan Debt Should Be Separately Classified under Chapter 13 Bankruptcy Plans, *Delaware Journal of Corporate Law*, Vol. 44, №2-3, 2020, 255.

²⁹⁰ In the U.S. there is a federal homestead exemption of 27 900 \$, it means that debtors house up to this value is exempted and even if it is liquidated the debtors will receive that amount. In case it was used as a collateral than first the secured creditor is payed and then the debtor.

²⁹¹ German InsO, Section 290.

²⁹² *See Gvelebiani J., Kochlashvili A., Amisulashvili N.*, Feasibility Study: On the Regulation of Personal Insolvency, Tbilisi, 2021, 41.

Chapter 7. The “Means test” examines debtors by the median monthly income, comparing their income to the state’s median income and examining their disposable income.

In Germany, consumer debtors are offered the possibility to get a discharge of their residual debts (see Subchapters 4.1. and 4.3.). The debtors are forced to try to settle with the creditors during the **out-of-court** and **in-court settlement proceedings** before the court hears the case. Afterwards, the debtor is given a 3-year compliance period to seek employment and repay the creditors. Then if the debtor cannot repay the creditors during those three years his assets are liquidated and the creditors receive the money out of it. The debtor gets discharged but needs to apply for discharge.

As we have already stated, there is a crisis of credit in Georgia, with 158,422 natural persons registered in the Debtors Registry. In Georgia potentially the creditors can seek enforcement of their claims for 10 years, which is almost 1/7 of an average person’s life. Therefore, it is essential to introduce an individual bankruptcy system that will give “**honest but unfortunate debtors**” a “fresh start”. It will impact the overall economy of Georgia positively and give indebted individuals the incentives to seek employment and become economically active members of society again. It will help not only the indebted individuals but the whole country’s economy. Also, we should highlight that the Constitution of Georgia guarantees the social rights of natural persons and social rights include that there is an individual bankruptcy system available (see Subchapter 5.3.).

Georgian legislators can create **a separate legal act** that will regulate the individual bankruptcy system close in line with the insolvency regime of legal entities. We discussed that the “two-window” principle can be implemented, meaning that debtors with income above some threshold can be imposed to participate in **repayment plans**, and other assets can be **liquidated** and distributed to creditors on a pro-rata basis. Georgian legislators should pay close attention to how this is regulated in the U.S. – because it’s the most tested system and in Germany – because it’s one of the most influential *civil law* jurisdictions.

The new law should provide an explicit definition of who is eligible for individual bankruptcy proceedings, it should also offer honest debtors the discharge of their debts, but keep dishonest debtors away from it. They should also declare non-dischargeable debts and exempt property and try to keep the balance between the satisfaction of creditors and the basic needs of debtors. The new law should also establish an authority that will administer and manage individual bankruptcy cases (see Subchapter 5.4.).

In addition, it is interesting to see when the individual bankruptcy system will be enacted in Georgia and how it will be regulated. Hopefully, the recommendations and discussions from this article will be useful for Georgian legislative practice and legal doctrine and not only for Georgian one.

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